IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.611 OF 1992

Hari Dattu Patil
res. at Dhakta Khanda,
Tal : Panvel,
Dist: Raigad. .. Appellant

vs.

Ambaji Gopal Mali,
res. at Khanda,
Tal : Panvel,
Dist: Raigad .. Respondent.

Mr.C.R.Dalvi with Mr. Rajiv Patil, Advocate for the Appellant.

Mr.S.G.Surana, Advocate for the Respondent.

CORAM : A.S.OKA, J.

DATED : 28th February, 2005.

ORAL JUDGMENT :

1. The challenge in this Appeal is to the Judgment and Order dated February 29, 1992 passed by the Learned Civil Judge, Sr. Division, Raigad at Alibag in Miscellaneous Application No.80 of 1991. The Appellant is the Original Defendant and the Respondent is the Original Plaintiff. The suit filed by the Respondent was decreed ex-parte

on September 9, 1991. The application for setting aside the ex-parte decree was filed on September 28, 1991.

2. Shri Dalvi, learned Counsel appearing for the Appellant submitted that there was sufficient cause for the Appellant to remain absent on the date on which the suit was heard. He submitted that the suit was kept on sine die list and on the application made by the Respondent Plaintiff on July 16, 1991, the suit was ordered to be fixed for hearing on July 30,1991. He submitted that the notice was ordered to be issued by the Court which was not at all served on the Appellant. He stated that the Advocate engaged by the Appellant informed him that the suit is fixed for hearing on September 18,1991. When the Appellant accompanied his Advocate on the Court on that date, the Appellant came to know that the suit was decreed ex-parte on September 9, 1991. He submitted that the Appellant has stated on oath that on July 29, 1991 the Bailiff did not tender the notice. He invited my attention to the deposition of the Appellant, the deposition of the Bailiff and the

deposition of his Advocate. He submitted that the evidence on record makes out a case for setting aside the ex-parte decree and for restoration of the suit.

3. Shri Surana, learned Counsel appearing for the Respondent stated that the notice was attempted to be served by the Court Bailiff on the Appellant on July 29, 1991 and Appellant refused to accept the service of Notice. Therefore, in accordance with Order 5 Rule 17 of the Code of Procedure 1908, notice was affixed on the premises of the Appellant. By pointing out depositions of the Respondent and the Advocate for the Appellant he submitted that the Advocate for the Appellant was aware on September 9, 1991 itself that the suit was being heard. He submitted that the Appellant has come out with a false case that he became aware on September 18, 1991 about the dismissal of the suit on September 9, 1991. He submitted that Application under Order 9 Rule 13 made by the Appellant was not maintainable.

4. It is not in dispute that the suit was

placed in Sine die list. On July 16, 1991 an application was made by the Respondent Plaintiff at exhibit 24 praying that the suit may be placed for hearing. Accordingly suit was fixed for hearing on July 13, 1991. As per the provisions of the Civil Manual, notice was directed to be issued by the trial Court to the Appellant. As the report of the Bailiff was not received back, on 30th July , 1991 next date was fixed on 9th September, 1991. On the next date the report was received by the trial Court from the Bailiff in which it was stated that on July 29, 1991 the Appellant refused to accept the service of notice and therefore notice has been pasted on the residential premises of the Appellant. The trial court recorded the evidence of the Plaintiff and proceeded to pass decree in favour of the Respondent Plaintiff.

5. The Court Bailiff was examined. He stated that at about 2.p.m. on July 29, 1991 he tendered the notice to the Appellant and Appellant refused to accept the notice and therefore the same was pasted in presence of two witnesses. The

Appellant stepped into the witness box. The Appellant stated that he did not receive the notice of the date fixed for hearing. He stated that he had no knowledge that the suit was fixed for hearing on September 9. 1991. However, there is an admission given in the cross examination that he was aware that the suit was adjourned to July 30, 1991. The Advocate for the Appellant stated in his evidence that he had been to the Court at Alibag on July 9, 1991. After completing the work at about 4.30p.m. he met the Respondent. On enquiry being made with the Respondent, the advocate learnt that the suit was fixed on September 18, 1991. That is the reason why the Appellant alongwith his Advocate visited the Court on September 18, 1991, when they were informed that the suit has been decreed ex-parte on September 9, 1991. The Respondent stated on oath that he met the Advocate of Appellant on September 9, 1991 and he told the Advocate that suit was likely to be heard on that date.

6. Even assuming that the case made out by the Respondent is correct, it must be noted that

the Appellant was served with the notice at 2 p.m. on July 29, 1991 when the suit was fixed on the next date. It is not the case of the Respondent that on July 30, 1991 a fresh notice was ordered to be issued to the Appellant informing him that the next date was September 9, 1991. There is no reason to disbelieve the statement made by the Advocate for the Appellant that the Respondent met him in the Court premises on September 9, 1991 and informed him that the suit was fixed on September 18, 1991.

7. It is true that the Appellant should have attended the Court on July 30, 1991. It is to be noted here that even according to the case of the Respondent the Appellant was served at 2 p.m. on July 29, 1991. The suit was on sine die list for considerably long time. Therefore, the time available for the Appellant who is residing at Village Khanda, Tal: Panvel, Dist: Raigad, to meet his Advocate and tell him about the date fixed on the next day was too short. It is also to be noted that the application for setting aside the ex-parte decree was made within the period of

20 days from the date of passing ex-parte decree. It is true that the Appellant may not be as diligent as a litigant is expected to be. However, question of applying for setting aside arises only when there is some default on the part of the litigant. When the application is made within a period of 20 days from the date of decree, considering the facts of the case the ex-parte decree was required to be set aside. In so far as issue regarding maintainability of Application raised by the Respondent is concerned it is necessary to refer to Rule 2 and 3 of Order XVIIof the Code of Civil Procedure. When a suit is fixed for hearing and when the Defendant remains absent, the Court is required to adopt one of the modes prescribed by Order 9 of the said code. Therefore, on the date on which suit was fixed for hearing the trial court proceeded ex-parte against the Appellant and decreed the suit after recording the evidence of the Respondent. This is not the case where the decree is passed under Rule 5 or 10 of Order VIII of the Civil Procedure Code. Therefore, application under Order IX Rule 13 was maintainable.

7. After the trial Court passed the impugned order, initially the Appellant filed the Writ Petition which was later on converted into Appeal from Order. The Appeal from Order was dismissed for want of prosecution in the year 1999. It was restored in the year 2005. In the meanwhile order of stay was operating to the judgment and decree passed in favour of Respondent. All this has caused serious prejudice to the Respondent. He will have to be compensated by ordering payment of heavy costs. The Amount of the costs will be quantified at Rs.7,500/-.

8. Hence, I pass the following order.

(i) The impugned judgment and order is quashed and set aside and Misc. Application No.80 of 1991 is allowed.

(ii) The ex-parte decree passed in the Special Civil Suit No.76 of 1988 is quashed and set aside and the suit is restored to file subject to condition of the Appellant paying the sum of

Rs.7,500/- (Rupees Seven Thousand Five Hundred Only) to the Respondent within a period of six weeks from today. If the amount is not accepted by the Respondent, the Appellant is at liberty to deposit the said amount in the trial Court within the stipulated time. If the amount of costs is not paid or deposited within the stipulated time, the impugned judgment and order will stand and the ex-parte decree will continue to operate. If the amount of costs is paid by the Appellant within the stipulated time, the parties will appear before the learned trial Judge on April 19, 2005 at 11.00 a.m. for fixing the schedule of hearing. It is made clear that the trial Court will not issue a fresh notice to both the parties informing them about the date fixed.

(iii) The Respondent will be at liberty to recall the witnesses who are already examined and he is at liberty to lead any further evidence. The Appellant will be at liberty to cross examine the witnesses who are already examined and is also at liberty to lead his own evidence. The Appellant will not ask for an adjournment on any

unreasonable ground. The learned trial Judge is directed to decide the suit as expeditiously as possible on or before October 31, 2005.

. All parties and the concerned Court to act on the authenticated copy of this order.

(A.S.Oka, J.)